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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 31st MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 6 p.m.

Chairman: Mr. IVAN (Romania) (Vice-Chairman)

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The meeting was called to order at 6 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.53)

Part 2 of the draft Statute (*continued*)

Discussion paper prepared by the Bureau (*continued*)

Articles 6-20 (*continued*)

1. **Mr. KAM** (Burkina Faso) said that his delegation wished to see an independent and effective Court, strong enough to prosecute all crimes within its jurisdiction. With respect to the jurisdiction of the Court, therefore, it was in favour of option 2 in article 7, conferring automatic jurisdiction over the core crimes enumerated in article 5 under (a), (b), (c) and (d). It also supported article 7 *ter* on acceptance by non-States parties. Article 7 *bis* should be deleted.

2. The Prosecutor must have the independence enabling him or her to initiate procedures which might be blocked by a State or the Security Council. His or her powers should however be subject to control by the Pre-Trial Chamber. Burkina Faso therefore favoured option 1 in article 12. The Security Council should have the power to refer situations other than the crime of aggression to the Court. However, it should not be able to act as a censor of the Court. Any deferral should be for the shortest feasible period of time and should not be renewable.

3. **Mr. TAFA** (Botswana) endorsed the statements made by South Africa on behalf of the Southern African Development Community (SADC) States and by Malawi. He rejected the "opt-in/opt-out" approach: in his delegation's view, States ratifying the Statute must accept the Court's automatic jurisdiction in respect of all the core crimes. That did not mean he did not want to see a universally accepted court. However, the ideal of universality should not be achieved at the expense of effectiveness.

4. On the second issue, Botswana preferred option 1 in article 7. It also favoured an independent Prosecutor able to initiate investigations *proprio motu*, subject to control by the Pre-Trial Chamber. Nor was it opposed to the Security Council having the right to refer to the Prosecutor situations in which crimes other than aggression appeared to have been committed.

5. **Mr. AGBETOMEY** (Togo) said that the Court should be able to exercise its jurisdiction over all core crimes in accordance with article 6 (a), (b) and (c). Consequently, his delegation also supported article 12, option 1, as it was convinced that the Prosecutor needed ex officio powers. It preferred option 1 in article 7 on acceptance of jurisdiction, and supported article 7 *ter*. Article 7 *bis* should be deleted. On the role of the Security Council, option 1 for article 10, paragraph 1, would be very important if the crime of aggression were included in the list of crimes, as would option 1 for paragraph 2.

6. **Mr. DOUDECH** (Tunisia) said his delegation felt that option 2 on exercise of jurisdiction was the one most likely to ensure the effectiveness of the Court. As for acceptance of jurisdiction, Tunisia favoured a combination of automatic jurisdiction for certain crimes and explicit acceptance for others. Discussions should continue with a view to reaching a consensus on the role of the Prosecutor. The Court should not be prevented by the Security

Council from exercising jurisdiction over situations involving the crime of aggression. Nevertheless, due weight must be accorded to the latter body's role in the maintenance of international peace and security.

7. **Mr. MIKULKA** (Czech Republic) said that, as the trend of the debate had been to limit the number of crimes within the jurisdiction of the Court, that jurisdiction should be automatic. His delegation saw no justification for an "opt-in" regime, and thus supported article 7, paragraph 2. It was opposed to article 7 *bis*. An "opt-in" declaration should be open only to States not parties to the Statute, as envisaged in article 7 *ter*.

8. On the question of preconditions to the exercise of jurisdiction, it would be sufficient if a single State among those listed in paragraph 1 of article 7, option 1, accepted the jurisdiction of the Court. The Czech delegation was firmly opposed to the idea that the consent of the State of nationality of the accused should be a sine qua non for the exercise of jurisdiction. It was flexible on the role of the Prosecutor. Finally, the Statute must absolutely respect the functions of the Security Council, and his delegation thus supported article 6 (b) and option 1 in paragraphs 1 and 2 of article 10. However, it saw no justification for paragraph 3 of article 11, which should be deleted.

9. **Mr. MORSHED** (Bangladesh) said his delegation was in favour of automatic jurisdiction in respect of the core crimes, but that, as a compromise, it could consider a combination of automatic jurisdiction and an "opt-out" regime in respect of particular crimes. On preconditions, he strongly supported the compromise proposed by the Republic of Korea. Acceptance of jurisdiction by the territorial State was indispensable. To endow the Prosecutor with the power to initiate proceedings *proprio motu* would be to invest a single individual with some of the attributes of a State. The checks and balances in the proposal by Germany and Argentina would have to be significantly expanded to obviate the pressures to which a Prosecutor endowed with such powers would be exposed. The regime of the Charter under Chapter VII must at all costs be preserved, but the language of option 1 in article 10, paragraph 1, was perhaps unduly wide-ranging. The Security Council must also have the power to refer situations to the Court. On deferral, Bangladesh supported the carefully constructed Singapore compromise together with the Belgian proposal concerning the preservation and protection of evidence.

10. **Mr. DE SARAM** (Sri Lanka) said that, given the clarity of general international treaty law and customary law with respect to the crime of genocide, it was reasonable to expect that a State becoming a party to the Statute should thereby accept the Court's jurisdiction with respect to that crime. The same clarity did not obtain with respect to war crimes and crimes against humanity. He therefore agreed with the proposal by the International Law Commission that acceptance of jurisdiction over those crimes should be in accordance with the so-called "opt-in" procedure.

11. On acceptance of jurisdiction, Sri Lanka supported option 4 in article 7, although it also favoured the additional requirement of the consent of the State in which the suspect was present. As to article 10, once a matter was before the Court, the international criminal law process must be allowed to proceed without interference from extraneous entities. Sri Lanka therefore strongly favoured option 3 in article 10, paragraph 2. It could not agree to the power of the Prosecutor to act *proprio motu*, in article 12, since the position of a prosecutor in international jurisdictions differed from his or her position in national jurisdictions. It fully supported articles 15 and 16. Once the crimes to come before the Court had been determined, the question of complementarity was a necessary but not an essential component.

12. **Ms. WYROZUMSKA** (Poland), speaking also on behalf of Lithuania, said her delegation believed strongly that the Court should have automatic jurisdiction over core crimes, as an essential precaution for its effectiveness and credibility. On the exercise of the jurisdiction, given the nature of the crimes concerned, option 1 in article 7, paragraph 1, offered an acceptable solution. The Prosecutor must have the power to initiate proceedings *proprio motu*, subject to suitable safeguards. Option 1 in article 12 was therefore preferable, and the Polish and Lithuanian

delegations consequently also supported the inclusion of article 6, paragraph (c). While the Security Council should have some role, there should be a proper balance between the competence of the Council and the independence of the Court. That balance was reflected in option 1 for article 10, paragraph 1.

13. **Ms. PERALBA GARCIA** (Andorra) said her delegation was in favour of automatic jurisdiction of the Court over the core crimes. The Prosecutor should be able to initiate an investigation *proprio motu*; Andorra therefore favoured the retention of article 6, paragraph (c), and of article 12. A balance between the Security Council's powers and those of the Court was essential. Her delegation thus supported article 6, paragraph (b), and the retention of article 10, paragraph 1.

14. **Mr. LARREA DAVILA** (Ecuador) said his delegation favoured the inclusion of article 6, paragraph (c), which gave the Prosecutor the power to initiate the investigation of a crime under the jurisdiction of the Court in accordance with article 12. On article 7, Ecuador was still of the view that the Court should have universal jurisdiction over the crimes included in the Statute. It could, however, support option 1 as a basis for compromise. On article 11, it supported option 2 on the understanding that the Court would be an independent organ created through an international treaty. As to article 12, his delegation believed that the Prosecutor must be strong and independent and have the power to initiate investigations *proprio motu*. It could, however, support the compromise solution in option 1 for the sake of consensus. Article 15, on admissibility, was fundamental, and should be retained in its present wording so as to safeguard the principle of complementarity.

15. **Mr. AL-SA'AIDI** (Kuwait) said his delegation preferred option 1 in article 7, paragraph 1. It favoured automatic jurisdiction for the most serious crimes, and a consent regime for the others. With respect to article 10, he affirmed the need to guarantee the independence of the Court. Nevertheless, the role of the Security Council with respect to the crime of aggression under Chapter VII of the Charter needed to be clearly spelled out. On article 12, the Prosecutor should be able to exercise his or her powers ex officio, subject to appropriate control by the Pre-Trial Chamber. In article 20, paragraph 1 (b), the term "general international law" should be amended to read "public international law".

16. **Mr. NGATSE** (Congo) said that the Statute should provide for automatic jurisdiction of the Court over genocide, war crimes, crimes against humanity and the crime of aggression. His delegation was in favour of universal jurisdiction, and thus regretted the omission of the proposal by Germany from the discussion paper. It would reluctantly accept option 1 on article 7, paragraph 1, as a compromise. However, it was opposed to the jurisdiction of the Court being subjected to a regime of acceptance by States, which should not be allowed the possibility of protecting those responsible for the most odious crimes. Article 7 of the document should be deleted, as it proposed a regime that could considerably weaken the powers of the Court.

17. The Prosecutor should have ex officio powers to initiate proceedings, and should not be subject to controls by the Pre-Trial Chamber, which should only intervene once proceedings had commenced, to check abuses. The prerogatives of the Security Council with regard to acts of aggression must be respected, provided they did not encroach on the jurisdiction of the Court. The Security Council should have the power to refer matters other than aggression to the Court. Although the Congo was opposed to conferring on the Council powers to suspend the Court's proceedings, it could, as a compromise, agree to a suspension for a maximum, non-renewable period of six months. Provision should be made to protect evidence and testimony. Article 10 was acceptable on that condition. The Congo was also in favour of option 2 in article 11. It endorsed the wording of article 15 and was in favour of the deletion of article 16.

18. **Mr. MAHMOOD** (Pakistan) said his delegation could accept option 3 in article 7, with the exclusion of any role for the Prosecutor. It also favoured article 7 *bis* on opt-in, and article 7 *ter*. On article 6, only States parties should be able to refer situations to the Prosecutor. Paragraph (c), and also paragraph (b), should therefore be deleted. Concerning article 10, the Security Council should not have a role, for the reasons given by India. The Prosecutor should not have the power to initiate proceedings *proprio motu*, so article 12 should be deleted. Article 15 was essential to the Statute, but needed to be strengthened.

19. Paragraph 1 of article 16 was acceptable. However, paragraphs 2 and 3 posed some problems, as Pakistan was not in favour of the Prosecutor determining that a State was unwilling or unable genuinely to carry out investigations. However, the Prosecutor should be able to undertake investigations after a State party had referred a matter to him or her and if there had been a fundamental change in the circumstances, resulting in a total breakdown of State authority.

20. **Mr. ABDALLA AHMED** (Iraq) said that only States parties should be able to trigger investigations and that paragraphs (b) and (c) of article 6 must therefore be deleted. Conferral of automatic jurisdiction with respect to the crimes included in the Statute could run counter to the principle of complementarity. Iraq therefore preferred an "opt-in" regime under article 7.

21. With respect to article 10, on the role of the Security Council, in the light of the overriding need to ensure the independence of the Court, Iraq could not support any of the options. Referral of a situation by the Security Council under the Chapter VII procedure would inevitably have an impact on the decision of the Court. Article 11, paragraph 3, should also be deleted, and the title of that article amended to read "Referral of a situation by a State Party".

22. On article 12, Iraq was opposed to the initiation of an investigation by the Prosecutor *proprio motu*. Article 15 on admissibility should be drafted in such a way as to ensure complementarity between the jurisdiction of the Court and national jurisdictions. Article 16 was acceptable, subject to his comments on article 6. In article 18, on the principle of *ne bis in idem*, Iraq supported paragraphs 1 and 2, but paragraph 3, which contravened the principle of complementarity, should be deleted.

23. **Ms. SIMONE** (Armenia) said her delegation supported automatic jurisdiction over genocide and State consent for jurisdiction over crimes against humanity and war crimes. However, it would not stand in the way of consensus on that issue. Regarding which States should be parties to the Statute before the Court exercised jurisdiction, it supported option 1 in article 7. Armenia strongly supported the power of the Prosecutor to act *proprio motu*, and believed that option 1 in article 12 contained sufficient safeguards, with the procedure for screening of requests by the Pre-Trial Chamber. It also supported the inclusion of article 6, paragraph (c), in the Statute.

24. Concerning the role of the Security Council, Armenia supported option 3 in article 10. However, it might be able to accept a revised option 1 with tighter time limits and the addition of a provision to ensure preservation of evidence and protection of witnesses. Armenia also supported the proposal by the Netherlands and New Zealand that any request for deferral pursuant to Chapter VII of the Charter should take the form of a resolution, so as to ensure transparency.

25. **Ms. LA HAYE** (Bosnia and Herzegovina) said her delegation would have preferred the Court to have universal jurisdiction. However, for the sake of compromise, it could reluctantly accept option 1 in article 7, paragraph 1, with automatic jurisdiction over all core crimes. Options 3 and 4 in article 7 were unacceptable. She noted with concern that the discussion paper did not reflect the original option of an independent ex officio Prosecutor; however, her

delegation could accept option 1 for article 12 as a compromise solution. Article 16 was not acceptable in its present form.

26. Triggering of the Court's jurisdiction must not relieve the Security Council of its primary role in the maintenance of peace. The Council should have the power to trigger the jurisdiction of the Court with respect to situations in which one or more of the core crimes had been committed. Concerning its powers to suspend the Court's proceedings, her delegation could, as a compromise, accept option 1 for article 10, paragraph 2, with a provision to ensure protection of witnesses and preservation of evidence. A request to suspend an investigation should take the form of a resolution adopted by the Security Council under Chapter VII of the Charter.

27. **Mr. BAZEL** (Afghanistan) said his delegation favoured the deletion of article 6, paragraph (c), and of article 12. Concerning article 7, it supported option 3. It was in favour of inherent jurisdiction for the crimes of genocide and aggression. It favoured article 7 *bis*, subject to the reservation it had expressed on treaty crimes. It supported paragraph 1 *bis* in article 8. It favoured option 1 in paragraph 1 of article 10, limiting the role of the Security Council to that provided for under Chapter VII of the Charter. It had no problem with option 1 in paragraph 2, but favoured a period of six rather than twelve months, with only one renewal to be permissible. His delegation also supported the Belgian proposal concerning preservation of evidence. With regard to article 11, it favoured option 2.

28. **Mr. NEGA** (Ethiopia) said his delegation supported option 2 in article 6 and consequently, regarding the *proprio motu* power of the Prosecutor, option 2 for article 12. On acceptance of the jurisdiction of the Court, it supported an "opt-in" approach. On the preconditions required for the exercise of jurisdiction by the Court, subject to its position on article 6 (c), it supported option 1 in article 7.

29. Ethiopia supported option 1 for paragraph 1 of article 10, which it took to mean that the Court would have jurisdiction over the crime of aggression once the Security Council had determined the existence of an act of aggression. In that connection, he reiterated Ethiopia's view that the crime of aggression should be included in the Statute. The General Assembly should also have the power to refer cases to the Court. Any power of deferral conferred on the Security Council should not lead to undue delay in the Court's proceedings or compromise its independent and effective functioning. Ethiopia therefore favoured option 2 for paragraph 2 of article 10, with a shorter period not exceeding six months, renewable for not more than six months, to be decided by formal resolution of the Council. Finally, he again emphasized the importance of the principle of complementarity in articles 15 and 16 as currently formulated.

30. **Mr. HADI** (United Arab Emirates) said his delegation found it difficult to accept automatic jurisdiction. It therefore supported article 7 *bis* on the need for express acceptance by States of the jurisdiction of the Court over the three core crimes. It also supported the role of the Security Council under the Charter in respect of the crime of aggression but did not believe that the Council should be able to interfere with the Court's jurisdiction. The General Assembly should have the same power as the Security Council to refer situations to the Prosecutor. The Prosecutor should not have the power to initiate investigations *proprio motu*, and article 12 should thus be deleted. As for admissibility, an alternative formulation of article 15, consistent with the principle of complementarity, was needed. Article 16 was acceptable in principle.

31. **Mr. AL-AMERY** (Qatar) said his delegation was in favour of option 1 of article 7, as a satisfactory compromise on acceptance of jurisdiction. Concerning the Prosecutor, it supported option 1 for article 12, with the term *proprio motu* replaced with the term ex officio. The Court must be protected from any pressures that would

undermine its independence and impartiality. The Security Council's role should thus be limited to initiating the proceedings under Chapter VII of the Charter in option 1 of article 10.

32. **Ms. REFFI** (San Marino) said her delegation strongly supported automatic jurisdiction, as essential to a really effective court. With regard to preconditions to the exercise of jurisdiction, it favoured option 1 in article 7. The Prosecutor should be empowered to act *proprio motu*. San Marino thus favoured the inclusion of article 12, which also provided sufficient safeguards, notably in the form of the Pre-Trial Chamber. Regarding the role of the Security Council in relation to crimes other than aggression, the best solution would be to avoid any interference by the Council in the functions of the Court. It might, however, be possible to compromise on a solution which provided a proper balance between the two bodies.

33. **Mr. MWANGI** (Kenya) said his delegation was prepared to support automatic acceptance by States of jurisdiction over the core crimes upon ratification. On preconditions to the exercise of jurisdiction, it preferred option 1 for paragraph 1 of article 7. Article 7 *ter* on acceptance by non-States parties was also necessary. Kenya continued to doubt the desirability of conferring *proprio motu* powers on the Prosecutor particularly because of the danger that pressure might be exerted on him or her to act or not to act, to the detriment of his or her independence. However, it would not stand in the way of consensus on that issue.

34. Option 1 for paragraph 2 of article 10, on deferral, represented a necessary balance that recognized the current state of international law with regard to the primary responsibility of the Security Council regarding international peace and security. However, the period of twelve months should be reduced to six, with the possibility for one six-month extension. On the Council's role with regard to the crime of aggression, Kenya preferred option 1 for paragraph 1 of article 10.

35. **Mr. GONZALEZ GALVEZ** (Mexico) said it was essential for the Court to have automatic jurisdiction over those crimes on which there was general agreement. That did not mean that some crimes might not fall within an "opt-in" regime. Option 1 for article 7 was the most promising, subject to certain amendments. Its paragraph 1 (b) should be amended by the addition of the words "in accordance with international law", to exclude the possibility of nationals of one country being kidnapped and brought before the courts of another country in violation of the rights of the territorial State.

36. On the Security Council, the most serious concern was deferral of the Court's consideration of a case. Mexico had circulated an informal paper on that question, containing a revised version of the Spanish proposal on the same matter. Concerning referral by the Security Council, practice had shown that there was a residual power of the General Assembly to act on the basis of Chapter VII. Furthermore, situations should be referred to the Court by the Council pursuant to article 27, paragraph 2, of the Charter; in other words, they should constitute a procedural matter not subject to veto by the permanent Members.

37. In article 16, the sentence beginning "At the request of that State, the Prosecutor shall defer to" should be restated in more affirmative terms. Lastly, in article 15, paragraph 3, the word "partial" should be replaced by "substantial", since the "partial" collapse of a judicial system would be difficult to determine in practice.

38. **Ms. PLEJIĆ-MARKOVIĆ** (Croatia) expressed great concern over the omission of the proposal of Germany, which reflected widespread views on the need for automatic jurisdiction. It was far from certain that automatic jurisdiction would limit States' participation. A weak court would be worse than no court at all. Her delegation rejected the idea of an "opt-in" or "opt-out" approach or, worse still, a State consent regime. The Prosecutor should be able to act ex officio. The Security Council should have no role, except in relation to the crime of aggression. On

the issue of deferral, Croatia feared that the proposed twelve-month period might provide sufficient time for Governments to conceal traces of crimes. More safeguards were needed. Finally, Croatia saw no need for article 16, which would be a further obstacle to the work of the Prosecutor.

39. **Mr. RHENAN SEGURA CARMONA** (Costa Rica) said that States' acceptance of the jurisdiction of the Court should be automatic by virtue of their ratification of the Statute. His delegation favoured inclusion of the crimes listed in article 5, although it did not agree to the use of the word "systematic" to qualify crimes. Article 7 *bis*, which provided for optional participation, was unacceptable. Costa Rica was in favour of conferring ex officio powers on the Prosecutor and supported the idea of a Pre-Trial Chamber. The Court should be an autonomous and independent body, and the Security Council should therefore intervene only in respect of the crime of aggression. Costa Rica would support a solution that respected the independence of the Prosecutor and struck a proper balance between the roles of the Court and the Council, such as those proposed by the delegations of Spain and Mexico. Lastly, in the interests of consensus his delegation would support article 15 as currently drafted.

40. **Mr. MIRZAEE YENGEJEH** (Islamic Republic of Iran) said that automatic jurisdiction should be limited to the crime of genocide. The wording of article 7, paragraph 2, should reflect that preference. Article 7 *bis* should be the basis for the jurisdiction of the Court over the remaining crimes.

41. As for the role of the Security Council, his delegation favoured the deletion of article 10 *in toto*, preferring a parallel role for the Court in the determination of aggression, to enable it to act in case of failure by the Security Council to discharge its responsibilities.

42. His delegation was not convinced that conferring *proprio motu* powers on the Prosecutor would serve any useful purpose. It seemed inconceivable that where crimes covered by the Statute were committed, States themselves would fail to react. His delegation thus supported the deletion of article 6, paragraph (c), and article 12. On State consent, it preferred option 4 in article 7. Lastly, the principle of complementarity, essential to the smooth functioning of the Court, must be clearly defined; and articles 15 and 16 provided a good basis in that regard. However, paragraph 2 (c) of article 15 needed some amendment to bring it into line with that principle.

43. **Mr. PRANDLER** (Hungary) said his delegation favoured automatic jurisdiction over all core crimes, and therefore supported option 1 in article 7 and article 7 *ter*. The Prosecutor should have the power to initiate proceedings *proprio motu*, and paragraph (c) of article 6 should thus be retained. Article 15 struck a delicate balance on the important issue of complementarity. Hungary did not favour article 16, but might be able to accept it if a compromise proved necessary. Concerning the role of the Security Council, it was in favour of option 1 in both paragraphs of article 10. Lastly, he noted that article 10 omitted to mention the important issue of referral of situations by the Security Council acting under Chapter VII of the Charter, which was, however, mentioned elsewhere, in paragraph (b) of article 6.

44. **The CHAIRMAN** said that consideration of the Bureau discussion paper on Part 2 (A/CONF.183/C.1/L.53) was thus concluded.

The meeting rose at 7.30 p.m.